

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAYSON HARDING, a/k/a DEMARCUS IRBY,

Defendant-Appellant.

UNPUBLISHED

November 21, 2006

No. 263267

Wayne Circuit Court

LC No. 04-008972-01

Before: Cooper, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of armed robbery, MCL 750.529, for which he was sentenced to 18 to 40 years in prison. We affirm.

Defendant first argues that the trial court deprived him of a fair trial when it allowed the prosecutor to present the testimony of an unendorsed rebuttal witness but refused to allow the testimony of a defense surrebuttal witness. We disagree. A trial court's decision regarding the introduction of surrebuttal testimony is reviewed for an abuse of discretion. *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996).

Rebuttal testimony is that given by a party to "contradict, repel, explain or disprove evidence produced by the other party, and tending directly to weaken or impeach the same." *Figgures, supra* at 399 (citation and internal quotation marks omitted). Rebuttal evidence is properly admitted where it is relevant to evidence introduced by the defendant, regardless of whether it could have been offered in the prosecution's case-in-chief. *People v Bettistea*, 173 Mich App 106, 126; 434 NW2d 138 (1988). The trial court may refuse to admit surrebuttal evidence if the defendant has already presented evidence on the matter, and further proofs are not necessary to impeach the rebuttal evidence. See *People v Solak*, 146 Mich App 659, 675; 382 NW2d 495 (1985).

Defendant presented a defense that he was a mere spectator, and not a participant, in the armed robbery of Robert Davis and his cousin, Romell Jones, by defendant's brother, William Harding, and his brother's associate, Thomas Spikes. Defendant testified that Davis reached for a compartment under the steering wheel of Jones' car where Jones kept a gun hidden, but that Harding prevented Davis from retrieving the gun. Defendant also testified that although Harding called to him to take the gun from the car, defendant's sister, Shalonda Smith, told defendant to stay out of it, so he did not take the gun. Harding then took the gun from the compartment. The

prosecution called Jones' stepfather, Jerome Williams, as a rebuttal witness to testify that he had leased the vehicle that was present at the incident, that there were no modifications to the car where there would be a compartment in which to hide a revolver, and that the car was returned in perfect condition when the lease ended. Defense counsel then announced he had a possible surrebuttal witness, but that the witness had been in the courtroom during the trial.

The trial court did not abuse its discretion when it refused to allow the surrebuttal testimony. Williams' testimony was properly admitted to contradict defendant's claim that there was a compartment in the vehicle where Jones kept a gun. At that point, there was evidence presented by both sides regarding the existence of the compartment, and the trial court properly concluded that additional evidence was not necessary on that tangential issue. Additionally, we note that the jury found defendant guilty of both counts of armed robbery but not guilty of felony-firearm. Felony-firearm is an offense involving a "person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony." MCL 750.227b. The only reasonable explanation of the jury's verdict is that the jury found defendant guilty of armed robbery as an accomplice, but was not convinced beyond a reasonable doubt that he actually possessed a firearm during the incident. Therefore, it appears that the introduction of surrebuttable evidence regarding the compartment with the gun would have had no impact on the outcome of the trial.

Defendant also argues that the prosecution, by way of improper cross-examination and closing argument, shifted the burden of proof to the defense. We disagree. Defendant failed to preserve this issue at trial as he did not object to the prosecutorial remarks. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Therefore, this Court is limited to reviewing the issue for plain error affecting defendant's substantial rights, i.e., error that was outcome determinative. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Claims of prosecutorial misconduct are reviewed on a case-by-case basis to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). This Court examines the record and evaluates the remarks in context, taking into consideration the defendant's arguments. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). In general, "[p]rosecutors are accorded great latitude regarding their arguments and conduct" and are "free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (citations and internal quotation marks omitted). A prosecutor may fairly respond to an issue raised by the defendant. *People v Fields*, 450 Mich 94, 110-111; 538 NW2d 356 (1995). When the defendant advances a defense, the prosecutor may comment on the defendant's failure to produce corroborating witnesses, and such comment does not shift the burden of proof to the defendant. *Id.* at 111-112.

The prosecutor's questioning of defendant on cross-examination and comments during the closing argument did not shift the burden of proof to defendant. In his opening statement, the prosecutor explained that he would not call Smith to testify because she was the sister of two of the defendants and it was unclear whether she knew the men were planning to rob Jones and Davis and lured them to her house for that purpose. During defendant's testimony, the prosecutor asked defendant where Smith was, to which defendant replied, "I don't know, sir. You're the one who said you don't trust her. That her testimony would not [be] trustworthy because you think she had something to do with it." In his closing argument, after stating that

the defense had no burden of proof, the prosecutor suggested that the jury could consider Smith's absence when deciding whether to believe defendant's claim that he was only a spectator during the incident. We find no error, plain or otherwise, in the prosecution's questioning or argument.

Defendant raised the issue whether he was just a spectator or a participant in the offense during his testimony at trial. Once this defense was raised, the prosecutor was free to address the issue, raise inferences regarding the evidence, and comment on the defendant's failure to produce corroborating witnesses. *Id.* at 110-112. Asking defendant why his sister was not testifying on his behalf did not shift the burden from the prosecution to prove all the elements of the offense. *Id.* at 111-112. Moreover, both the prosecutor and the trial court reiterated that the prosecution had the burden of proof, and the court instructed the jury that the attorneys' statements and questions were not evidence. Therefore, the prosecutor's question and comments did not shift the burden of proof, and defendant is not entitled to a new trial.

Affirmed.

/s/ Jessica R. Cooper

/s/ Joel P. Hoekstra

/s/ Michael R. Smolenski